

DATE: November 16, 2000

CASE NO: 2000-INA-79

In the Matter of

GOURMET PIZZA DELI
Employer

on behalf of

CARLOS ALBERTO MARTINEZ
Alien

Appearances: Germaine Wright Sobral, Esq.
For Employer and Alien

Certifying Officer: Richard E. Panati, Region III

Before: Burke, Huddleston, and Jarvis
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Gourmet Pizza Deli's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the

requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On May 10, 1996, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the Virginia Employment Commission on behalf of the Alien, Carlos Alberto Martinez. (AF 28-29). The job opportunity was listed as "Cook". The job duties were described as follows:

To cook, prepare and season soups, meats, vegetables, desserts, and other food stuffs in the American Style Cuisine.

(AF 28). The stated job requirements for the position, as set forth on the application, included two years of experience in the job offered. (Id.).

In a Notice of Findings ("NOF") dated December 17, 1998, the CO proposed to deny certification. (AF 15-17). The CO found, after a review of the menu submitted with the application for labor certification, that the Dictionary of Occupational Titles ("DOT") Code should not be a Cook, 313.361-014¹, but a combination of Baker, Pizza, 313.381-014², with a Specific Vocational

¹The DOT provides the following definition for 313.361-014 Cook (hotel & rest.) alternate titles: cook, restaurant: Prepares, seasons, and cooks soups, meats, vegetables, desserts, and other foodstuffs for consumption in eating establishments: Reads menu to estimate food requirements and orders food from supplier or procures food from storage. Adjusts thermostat controls to regulate temperature of ovens, broilers, grills, roasters, and steam kettles. Measures and mixes ingredients according to recipe, using variety of kitchen utensils and equipment, such as blenders, mixers, grinders, slicers, and tenderizers, to prepare soups, salads, gravies, desserts, sauces, and casseroles. Bakes, roasts, broils, and steams meats, fish, vegetables, and other foods. Adds seasoning to foods during mixing or cooking, according to personal judgement and experience. Observes and tests foods being cooked by tasting, smelling, and piercing with fork to determine that it is cooked. Carves meats, portions food on serving plates, adds gravies and sauces, and garnishes servings to fill orders. May

Preparation (“SVP”) level of 5, consisting of six months to one year, and Sandwich Maker 317.644-010³, with an SVP of 2, consisting of a short demonstration up to and including one month. The change was based upon the fact that the establishment “appears to be primarily a sandwich and pizza shop. The foods which are listed (pizza and sandwiches) do not require extensive training in cooking in order to prepare and cook. The preparation of these food items does not correspond with the job duties of a

supervise other cooks and kitchen employees. May wash, peel, cut, and shred vegetables and fruits to prepare them for use. May butcher chickens, fish, and shellfish. May cut, trim, and bone meat prior to cooking. May bake bread, rolls, cakes, and pastry [BAKER (hotel & rest.) 313.381-010]. May price items on menu. May be designated according to meal cooked or shift worked as Cook, Dinner (hotel & rest.); Cook, Morning (hotel & rest.); or according to food item prepared as Cook, Roast (hotel & rest.); or according to method of cooking as Cook, Broiler (hotel & rest.). May substitute for and relieve or assist other cooks during emergencies or rush periods and be designated Cook, Relief (hotel & rest.). May prepare and cook meals for institutionalized patients requiring special diets and be designated Food-Service Worker (hotel & rest.). May be designated: Cook, Dessert (hotel & rest.); Cook, Fry (hotel & rest.); Cook, Night (hotel & rest.); Cook, Sauce (hotel & rest.); Cook, Soup (hotel & rest.); Cook, Special Diet (hotel & rest.); Cook, Vegetable (hotel & rest.). May oversee work of patients assigned to kitchen for work therapy purposes when working in psychiatric hospital. GOE: 05.05.17 STRENGTH: M GED: R3 M3 L3 SVP: 7 DLU: 81

²The DOT provides the following definition for 313.381-014 BAKER, PIZZA (hotel & rest.): Prepares and bakes pizza pies: Measures ingredients, such as flour, water, and yeast, using measuring cup, spoon, and scale. Dumps specified ingredients into pan or bowl of mixing machine preparatory to mixing. Starts machine and observes operation until ingredients are mixed to desired consistency. Stops machine and dumps dough into proof box to allow dough to rise. Kneads fermented dough. Cuts out and weighs amount of dough required to produce pizza pies of desired thickness. Shapes dough sections into balls or mounds and sprinkles each section with flour to prevent crust forming until used. Greases pan. Stretches or spreads dough mixture to size of pan. Places dough in pan and adds olive oil and tomato puree, tomato sauce, mozzarella cheese, meat, or other garnish on surface of dough, according to kind of pizza ordered. Sets thermostatic controls and inserts pizza into heated oven to bake for specified time. Removes product from oven and observes color to determine when pizza is done. GOE: 05.10.08 STRENGTH: M GED: R3 M2 L1 SVP: 5 DLU: 77.

³The DOT provides the following definition for 317.664-010 SANDWICH MAKER (hotel & rest.) alternate titles: sandwich-counter attendant: Prepares sandwiches to individual order of customers. Slices cold meats and cheese by hand or machine. Selects and cuts breads, such as white, whole wheat, or rye, and toasts or grills bread, according to order. Places meat or filling and garnish, such as chopped or sliced onion and lettuce, between bread slices. Prepares garnishes for sandwiches, such as sliced tomatoes and pickles. May cook, mix, and season ingredients to make dressings, fillings, and spreads. May fry hamburgers, bacon, steaks, and eggs for hot sandwiches. May butter bread slices, using knife. GOE: 05.12.17 STRENGTH: M GED: R2 M1 L1 SVP: 2 DLU: 80.

Cook (hotel & rest.) 313.361-014 which is a highly skilled occupation.” (AF 16). The CO restated the DOT description of the occupation of Cook, and explained that the cook in Employer’s restaurant does not prepare soups, salads, gravies, desserts, sauces, and casseroles, nor does this employee bake, roast, broil, and steam meats, fish and vegetables. The CO found that based on the DOT definitions, Employer’s menu, and the duties performed as stated on Employer’s Application, Employer’s requirement of two years experience in the job offered exceeded the norm for the job offered, and was therefore unduly restrictive. (AF 17). Employer was advised that it could rebut this finding by submitting evidence that its requirement arose from a business necessity or by reducing the requirements to the DOT and re-advertising. (Id.).

The Employer filed its rebuttal on January 15, 1999, which consisted of a letter from Employer’s owner. (AF 13-14). The Employer argued that the employment of the Alien is based on business necessity. (AF 14). Employer explained that the Alien has been employed as a cook for the past three years, and that some of his cooking duties include creating recipes for use in the restaurant’s preparation of marinara sauces, chili, soups, chowders, bean dips, barbecue, salad dressings, seafood dishes, pastas, desserts, poultry dishes, and various side dishes. Employer also contended that in addition to cooking, the Alien supervises the kitchen staff’s preparation of sandwiches and pizzas, and is responsible for sanitation and adherence to the applicable health code. The Employer also mentioned that the Alien’s bilingual skill was helpful to the business. (Id.).

The CO issued a Final Determination (“FD”) denying labor certification on January 29, 1999. (AF 11-12). The CO found that the Employer had not rebutted the finding that the job requirements were unduly restrictive. The CO stated that:

Your argument for the Cook vs. Baker, Pizza is that preparing the food offerings on the menu also involves creating recipes for sauces, chili, soups, dips dressings, seafood dishes, pastas, desserts, poultry dishes, and various side dishes and requires the skill of a more experienced cook. You also indicated that the person [encumbering] the position is required to supervise the kitchen staff and to insure adherence to sanitation and health codes. However, your menu clearly establishes that your business is primarily a pizza and sandwich shop. Although you indicate that the job also involves preparation of seafood dishes, pastas and various side dishes, such items are not reflected in your menu. Also, Form ETA, Part A, Item 17, reflects that no supervision of other employees is required, and insuring adherence to sanitation and health codes is not reflected as a job duty to be performed. There is no indication that the dinner selections change from week to week or from

menu to menu as they would in a full-service restaurant. Further, the dinners listed on the menu, although they involve some degree of skill, remain the same and are prepared over and over again in the same basic manner. The great majority of your menu items, such as pizzas and sandwiches, are simply and quickly prepared. The preparation of these food items does not correspond with the job duties of a Cook.

(AF 12). The CO further explained that the position of Cook required two to four years of combined education, training and experience, and would involve the preparation of many types of sauces, the use of several dry and moist heat cooking methods, the preparation of a large variety of foods that were not offered in the Employer's menu. The CO concluded that such a Cook would work in a restaurant that offers on its regular menu the variety and complexity of dishes that was described in the DOT occupation description of the work of a Cook, and therefore the application was correctly classified. As Employer's experience requirement exceeded the DOT norm, and as the Employer failed to delete the unduly restrictive requirement and did not persuasively establish its business necessity, certification was properly denied. (Id).

Employer's counsel filed a request for review on March 10, 1999, asserting that the two year experience requirement was not restrictive. (AF 1-10). The appeal argument by Employer's new counsel elaborated on the variety of foods that it offers, and attached a copy of the menu. (AF 7-10).

On September 27, 1999, this matter was remanded under 1999-INA-201 for the purpose of allowing the CO to determine whether or not the Employer filed a copy of its menu with its application, with its rebuttal, or at any time before the Final Determination was issued. *Gourmet Pizza Deli*, 1999-INA-201 (Sept. 27, 1999). If a copy of the menu was not part of the record before the CO at the time this Application was considered, the CO was instructed to issue a new NOF that would allow the Employer to remedy the absence from the record of evidence of the restaurant's menu and to issue a new Final Determination upon receiving its rebuttal to the second NOF. If a copy of the menu was a part of the record before the CO at the time the application was considered the CO was directed to complete the Appellate File and return the corrected Appellate File for further consideration by BALCA.

On November 30, 1999, the Certifying Officer returned the Appellate File to BALCA, stating that the Employer's menu was part of the case record at the time the application was considered. The CO explained that the menu appears at pages AF 7-10 of the administrative file and is referred to in the State Agency Transmittal Notice dated January 26, 1998 at page AF 20, and also appears in the Appeal File at AF 35-39 with the Application for Alien Employment Certification and Supporting Documents.⁴

DISCUSSION

⁴The State Agency Transmittal, Form ETA 7147 and Supporting documents which were noted in the Index to be at pages 19-27 were not included in the Appellate File.

The main issue in this case is whether the classification of the position as a combination “Baker, Pizza” and “Sandwich Maker” is correct. The second issue to be reviewed is whether the Employer has adequately documented that the two year experience requirement is either normally required for the job in the United States or that it arises from business necessity.

In its rebuttal, the Employer relies upon its menu, as documentation that the proper classification for the position is that of Cook (hotel and restaurant) and not a combination of “Baker, Pizza” and “Sandwich Maker”. Employer also asserted that some of the duties of the Cook include creating recipes for sauces, chili, soups, dips, dressings, seafood dishes, pastas, desserts, poultry dishes, and various side dishes and requires the skills of a more experienced cook. Employer’s menu consists of “Gourmet Pizzas,” salads, sandwiches, pastas, soup and desserts. The pasta dishes include spaghetti with meatballs, marinara sauce or pesto sauce, two types of lasagna, Parmesan dishes, and fettuccini with either vegetables or seafood. The desserts consist of Reese’s Peanut Butter Pie, Snickers Blitz Pie, brownies and chocolate chip cookies. The “seafood dishes” Employer mentioned in its rebuttal are the “Pizza di Mare” which consists of crabmeat, scallops, and shrimp, and the “Fettuccine Neptune” which also consists of crabmeat, scallops and shrimp. (AF 35-39). The recipes for the sauces, salad dressings, soups and desserts may be created by the Alien and made from scratch, as Employer insists, however, the Employer has provided no evidence, such as recipes, that could document this assertion. In addition, these are not especially complex products to prepare. In addition, there is no evidence of daily specials in addition to the menu items, and therefore the CO was correct in finding that there is no indication that the dinner selections change from week to week or from menu to menu as they would in a full-service restaurant. The listed dishes on the menu are set, and can be prepared from established recipes, and no special skill is required to follow a recipe. Furthermore, there is no evidence to support Employer’s argument that it would take two years of experience to learn to prepare these items, nor is there any evidence supporting Employer’s assertion that the DOT classification given by the CO is not the correct one. The combination of the Baker, Pizza description and the Sandwich Maker description encompass the many tasks involved in the preparation of the items served at Employer’s restaurant. Accordingly, it is found that the correct classification for this position is a combination of Baker, Pizza and Sandwich Maker. *See Potomac Pizza*, 2000-INA-83 (May 15, 2000) (finding that a similar menu of pizza, sandwiches, lasagna, pastas, and parmigiana dishes are not uncommon and constitute “standard fare in American cuisine and cooking and therefore the two years experience requirement was unduly restrictive).

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for, or qualify for, the job opportunity. *Kim, Oh, Cho, Inc.*, 1994-INA-490 (March 26, 1996). The purpose of 656.21(b)(2) is to make a job opportunity available to qualified U.S. workers. *Venture International Associates*, 1987-INA-569 (Jan. 13, 1989) (*en banc*). An employer cannot use requirements that are not normal for the occupation or are not included in the Dictionary of Occupational Titles unless it establishes a business necessity for the requirement.

The Board defined how an employer can show “business necessity” in *Information Industries*,

Inc., 1988-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that the employer show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business, and that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. Vague and incomplete rebuttal documentation will not meet the employer's burden of establishing business necessity. *Analysts International Corporation*, 1990-INA-387 (July 30, 1991). Failure to establish business necessity for an unduly restrictive job requirement will result in the denial of labor certification. *Robert Paige, & Associates, Inc.*, 1991-INA-72 (Feb. 3, 1993); *Shaolin Buddhist Meditation Center*, 1990-INA-395 (June 30, 1992).

The SVP for the positions of Baker, Pizza is five which indicates that a worker with six months to one year of experience will be able to deliver average performance in the job. In this case, Employer has done no more than make unsubstantiated assertions that the position at issue is that of a Cook (hotel and restaurant) and therefore the experience requirement of two years is justified. In order to demonstrate business necessity an employer must show factual support or a compelling explanation. *ERF. Inc.*, 89-INA-105 (Feb. 14, 1990). Unsupported conclusions are insufficient to demonstrate that the job requirements are supported by business necessity. *See generally, Our Lady of Guadalupe School*, 1988-INA-313 (June 2, 1989); *Inter-World Immigration Service*, 1989-INA-490 (Sept. 1, 1989), citing *Tri-P's Corp., dba Jack-In-The-Box*, 1987-INA-686 (Feb. 17, 1989).

In the instant case, Employer's menu does not document the business necessity of the requirement of two years experience. *See Il Forno, Inc.*, 1996-INA-394 (May 27, 1998) (Employer has not met its burden of showing reasonable need for a cook with two years experience in an Italian restaurant by relying on its menu as documentation of the business necessity of the experience requirement). Finding no error in the CO's classification of the job at issue, and the Employer having failed to establish a business necessity for the two experience requirement, certification was properly denied.

Order

The Certifying Officer's denial of labor certification is affirmed.

For the Panel:

DONALD B. JARVIS
Administrative Law Judge

San Francisco, California